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IN THE
COURT OF APPEALS OF INDIANA

REDBUD ESTATE SALES, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A04-0412-CV-657
	)	
STATE OF INDIANA and	)	
INDIANA DEPARTMENT OF	)	
NATURAL RESOURCES,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald Zore, Judge
Cause No. 49D07-0304-PL-753

October 19, 2006

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Redbud Estate Sales, Inc. ("Redbud") seeks rehearing appealing the trial court's grant of the State of Indiana and the Indiana Department of Natural Resources' (collectively, "the DNR") motion for judgment on the evidence and dismissal of its complaint. We vacate our dismissal of the appeal as premature and reinstate the appeal. Upon rehearing we affirm the trial court's dismissal of Redbud's complaint against the DNR.

Facts and Procedural History

Redbud sells manufactured and modular homes. When the DNR advertised in 2001 for bids on a project at Fort Harrison State Park in Indianapolis, Indiana, for a modular housing unit with a full basement, Redbud submitted a bid for $166,485.00. However, the project was awarded to Indiana Caulking Corporation ("ICC"), who had bid $148,900.00. ICC was not qualified to make bids on public works projects over $100,000.00. That is, Indiana Code § 4-13.6-4-11 provided at the time:

> (a) The director may not recommend to the commissioner the awarding of a contract to perform professional services to any person who is not qualified under this chapter.
> (b) The division may not accept a bid on a public works project with an estimated cost of one hundred thousand dollars ($100,000) or more from a contractor who is not qualified under this chapter.

In 2002, this statute was amended to read $150,000.00 instead of $100,000.00. *See* P.L.12-2002, Sec.2.

In November 2001, ICC contacted Redbud, whom it had heard about from the DNR, about providing the modular home for the Fort Harrison project. Redbud was

concerned about getting paid for the modular home, so it contacted the DNR, who—according to Redbud—assured it that it would be compensated. In December 2001, Redbud and ICC entered into a contract whereby ICC, the general contractor, would pay Redbud, the subcontractor, $81,300.00 for the modular home. The modular home was delivered to the Fort Harrison site in February 2002, and Redbud received a partial payment of $40,000.00 from ICC. Thereafter, Redbud and ICC had a dispute, and ICC did not pay Redbud the remaining $41,300.00 for the modular home. The record shows that the DNR paid ICC $87,000.00 for the modular home. In addition, ICC did not complete the Fort Harrison project, and the DNR had to hire another company to finish the job.

On March 22, 2002, Redbud sent the DNR a "Notice of Claim," which provides:

> [Redbud] has performed work and labor and furnished materials under a contract with [ICC] consisting of a modular home and installation of the modular home to a job site located at Fort Harrison State Park, 5853 Glenn Rd., Indianapolis, IN, under your proje[c]t #E035030.
>
> Please take notice that the sum of $41,300.00 is due and owing . . . on account of the above described work and/or materials.
>
> This Notice is given in an effort to hold DNR liable for the payment of the above claim to the extent of any amount which may now be due or may hereafter become due from the DNR to or for the above contractor, as well as to place DNR on notice of [Redbud]'s claim against any bond which may exist and cover this project.
>
> You are cautioned not to disburse any funds on account of the above project without making adequate provision for the satisfaction of this claim.

Ex. 19.

Following receipt of this letter, the DNR did not pay Redbud the remaining $41,300.00, and on October 10, 2002, Redbud filed a complaint against the DNR in Madison Circuit Court. In April 2003, the case was venued to Marion County. Redbud's complaint against the DNR alleges four counts. Although it is difficult to decipher the precise nature of each of the counts, it appears that none of them alleges a tort cause of action. That is, Count I alleges a cause of action for "replevin." Appellant's App. tab 1, p. 3-4. Count II appears to allege a cause of action for breach of contract. *See id.* at 4-5 ("The DNR continued to pay money out of its reserve on its contract to ICC and to other third parties and failed to pay the Plaintiff the monies due and owing to them. Pursuant to its contract, the DNR was obligated to retain such funds as necessary to pay any sub-contractors who submitted notice of claim and who were not paid on the project.") (formatting omitted). Count III alleges a cause of action for unjust enrichment. *See id.* at 5-6 ("The DNR and the State have unjustly received the benefit of the material, labor, and product of the Plaintiff, which was provided to the State. The State has unjustly received the benefit of the value of the $81,000 modular home on the property of the State, and has not paid the reasonable and fair value for the home.") (formatting omitted). And finally, Count IV alleges in part:

> The State, as the owner of the Fort Harrison State Park modular housing project under Project No. E035030 is believed to have entered into a written contract with ICC. The Plaintiff is a sub-contractor working for ICC under the contract. . . . The State has breached its fiduciary obligations to sub-contractors on the project to ensure payment from the proceeds paid by the State.

Id. at 6-7 (formatting omitted).

A bench trial was conducted in March and September 2004. At the conclusion of Redbud's case-in-chief, the DNR moved for judgment on the evidence. Both parties filed memorandums in support of their respective positions. Specifically, the DNR argued that Redbud could not recover against the DNR because there was no privity, that an unsuccessful bidder does not have standing to challenge the award of a bid, and that Redbud did not comply with the Indiana Tort Claims Act. In November 2004, the trial court granted the DNR's motion for judgment on the evidence and dismissed Redbud's complaint against the DNR. In its order, the trial court did not specify the reason or reasons for the dismissal.

Redbud then appealed to this court. In its Brief of Appellees, the DNR argued that there was no final judgment, and therefore this appeal should be dismissed, because ICC still had a cross-claim pending against the DNR. The DNR also filed a motion to dismiss the appeal. Thereafter, this court issued an order holding the appeal in abeyance until the trial court issued a final, appealable order. ICC ultimately dismissed its cross-claim against the DNR, and on June 15, 2006, this court issued an order stating that the matter was ripe for adjudication. Unaware of the above orders, we then issued an opinion in this case on August 31, 2006, dismissing the appeal because there was no final judgment. Redbud petitioned for rehearing, and we now grant its petition to address the merits of the issues raised on appeal.

Discussion and Decision

Redbud contends that the trial court erred in granting the DNR's motion for judgment on the evidence. The standard of review for a challenge to a ruling on a motion

for judgment on the evidence is the same as the standard governing the trial court in making its decision. *Smith v. Baxter*, 796 N.E.2d 242, 243 (Ind. 2003). Judgment on the evidence is proper only "[w]here all or some of the issues . . . are not supported by sufficient evidence . . . ." *Id.* (quoting Ind. Trial Rule 50(A)). The court looks only to the evidence and the reasonable inferences drawn most favorable to the non-moving party, and the motion should be granted only where there is no substantial evidence supporting an essential issue in the case. *Id.* If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper. *Id.*

As an initial matter, we note that Redbud does not challenge the trial court's dismissal of its claims against the DNR not related to its negligence claims. In moving for judgment on the evidence, the DNR argued that because Redbud was not in privity with the DNR, its claims against the DNR must fail. In making this argument, the DNR relied on *Savoree v. Industrial Contracting & Erecting, Inc.*, 789 N.E.2d 1013 (Ind. Ct. App. 2003). In *Savoree*, this court explained that there are four criteria used to evaluate whether the evidence supports a judgment under the theory of unjust enrichment in a dispute between a subcontractor and a property owner: (1) Whether the owner impliedly requested the subcontractor to do the work; (2) whether the owner reasonably expected to pay the subcontractor or the subcontractor reasonably expected to be paid by the owner; (3) whether there was an actual wrong perpetrated by the owner; and (4) whether the owner's conduct was so active and instrumental that the owner "stepped into the shoes" of the general contractor. *Id.* at 1018. In response to *Savoree*, Redbud argues on appeal that "Redbud's lack of privity with the DNR is inconsequential to Redbud's negligence

claims." Appellant's Br. p. 6. That is, Redbud asserts that *Savoree* does not "preclud[e] Redbud from proceeding against the DNR on a negligence theory." *Id.* at 7. Because Redbud does not dispute the dismissal of its claims against the DNR not related to its negligence claims, we do not address them on appeal and therefore affirm the trial court's dismissal of them.

As for Redbud's negligence claims against the DNR, the DNR responds that Redbud's complaint simply does not allege any. And Redbud does not claim that its complaint alleges any either. Rather, Redbud argues that it presented evidence at the bench trial that the DNR violated various statutes, specifically the qualified bidder statute quoted in the facts section of this opinion, and is negligent per se as a result.[1] In its memorandum supporting its motion for judgment on the evidence, the DNR argued that the trial court should strike the evidence that Redbud presented regarding the DNR's failure to follow the certification statute because such a "claim . . . was not alleged in the complaint and evidence in that regard is beyond the issues in this case." Appellant's App. tab 3, p. 6. On appeal, the DNR concedes that "[w]hile issues of a case as presented in the pleadings can be altered, there is a requirement that the issues be tried by express or implied consent." Appellee's Br. p. 19. The DNR's argument continues, "In this case, however, the State/DNR did not expressly or impliedly consent to trial of any claim of negligence in the implementation of a statute, and therefore, this Court should not address the merits of Redbud's statutory claims." *Id.*

[1] Redbud also alleges that the DNR violated Indiana Code §§ 4-13.6-2-6 and 4-13.6-7-9.

Generally, "the issues in a case are established by the evidence introduced at trial rather than by the pleadings." *Ralph E. Koressel Premier Elec., Inc. v. Forster*, 838 N.E.2d 1037 (Ind. Ct. App. 2005) (quoting *Curtis v. Clem*, 689 N.E.2d 1261, 1264 (Ind. Ct. App. 1997)), *reh'g dismissed*. Indiana Trial Rule 15(B) provides in part as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues.

It is true that Redbud presented evidence at trial concerning whether the DNR violated various statutes. For purposes of this opinion, then, we assume that Redbud's negligence claims were tried by express or implied consent of the parties.

This then brings us to the entirely separate issue of whether Redbud complied with the Indiana Tort Claims Act. Pursuant to Indiana Code § 34-13-3-6(a), a claim against the State (or a state agency) is barred unless notice is filed with the attorney general or the state agency involved within two hundred seventy days after the loss occurs. Indiana Code § 34-13-3-10 sets forth the content requirements of the notice that a plaintiff must provide and states, in pertinent part, that:

> The notice required by sections 6, 8, and 9 of this chapter must describe in a short and plain statement the facts on which the claim is based. The statement must include the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing of the notice.

The notice is sufficient if it substantially complies with the content requirements of the statute. *Orndorff v. New Albany Hous. Auth.*, 843 N.E.2d 592, 596 (Ind. Ct. App. 2006), *trans. denied*. "What constitutes substantial compliance, while not a question of fact, but one of law, is a fact-sensitive determination." *Id.* (quotation omitted). In determining whether substantial compliance is established, we note the purpose of the notice requirements as follows:

> To inform state officials with reasonable certainty of the accident or incident and surrounding circumstances and *to advise of the injured party's intent to assert a tort claim* so that the state may investigate, determine its possible liability, and prepare a defense against the claim.

Id. (emphasis added) (quotation omitted).

Here, the DNR argues that Redbud did not substantially comply with the statute because its March 22, 2002, "Notice of Claim" did not advise the DNR of its intent to assert a *tort* claim.[2] In support, the DNR relies on *Ricketts v. State*, 720 N.E.2d 1244 (Ind. Ct. App. 1999), *trans. denied.* In its reply brief, Redbud does not distinguish *Ricketts* or even address it but merely states, "Regardless of the State's argument, the evidence indicates that Redbud substantially complied with the provisions of Indiana's Tort Claims Act." Appellant's Reply Br. p. 5.

In *Ricketts*, the plaintiff hand-delivered a letter to the Indiana Bureau of Motor Vehicles complaining about a non-moving violation that he had received in South Carolina for which the BMV had given him too many points. The letter provided in pertinent part:

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[2] The DNR made this very same argument in its Memorandum in Support of Defendant Department of Natural Resources' Motion to Dismiss at Close of Plaintiff's Evidence.

May Contact at 812-752-4924 or 812-752-7856

Attention to Whom it May Concern:

In regards to a non[-]moving violation that I received in Coward S.C. on 3/9/94, the State of Indiana has sited [sic] me 8 points for this, this has cause [sic] server [sic] hardship on me and my family, since my employer, let me go over this 8 points. I am unable to find other employment with this condition since Aug of 1994. I'm sending a backup letter from Judge Sandra Grimsley to confirm this was a non[-]moving violation. I would sincerely appreciate a phone call as soon as possible, an opportunity to discuss this letter.

Sincerely,

Ed Ricketts

Id. at 1246-47. When the BMV did not respond to his letter, the plaintiff filed suit against the State, and the State responded that the plaintiff had failed to comply with the notice provisions of the Indiana Tort Claims Act. Thereafter, the trial court granted summary judgment in favor of the State.

On appeal, this court acknowledged that "[i]n order to constitute substantial compliance, the notice must not only inform the State of the facts and circumstances of the alleged injury but *must also advise of the injured party's intent to assert a tort claim*." *Id.* at 1246 (citing *Bienz v. Bloom*, 674 N.E.2d 998, 1005 (Ind. Ct. App. 1996), *reh'g denied, trans. denied)*. We then concluded:

> Although Ricketts' letter identified him as the claimant, identified circumstances which brought about the loss and requested an opportunity to discuss the letter with a BMV official, *the letter failed to inform the BMV that Ricketts intended to assert a tort claim*. Therefore, the letter did not substantially comply with the Act, *see Bienz*, and the trial court did not err in granting summary judgment in favor of the State.

Id. at 1247 (emphasis added).

In *Bienz*, on which the *Ricketts* court relied, Bienz, who worked for the Allen County Assessor's office, was fired. Thereafter, Bienz filed a grievance, which provided:

> Comes now Leslie Bienz, Respondent, and submits her request for a grievance hearing, arising out of her dispute with actions taken against her by County Auditor, Linda Bloom on December 30, 1991. Respondent was told that she was terminated. No cause was given, except that Respondent was alleged to be an employee at will. Respondent did not receive a due process hearing.
>
> Respondent denies that she is an "employee at will" as alleged by Linda Bloom.
>
> WHEREFORE, Respondent requests that she be granted a hearing through the Allen County grievance procedure, and for all other proper relief indicated.

Bienz, 674 N.E.2d at 1005. Bienz did not file a notice of tort claim. Thereafter, Bienz filed a 42 U.S.C. § 1983 action against Bloom and the Board of Commissioners of Allen County in federal court, which was later dismissed. Bienz then filed suit in state court against Bloom and the Board alleging constitutional, tort, and contract claims. The trial court granted the defendants' motion to dismiss on grounds that Bienz had failed to comply with the Indiana Tort Claims Act. On appeal from the dismissal of her state action, Bienz argued that she substantially complied with the notice provisions of the Tort Claims Act by virtue of the filing of her grievance and her subsequent federal action. In addressing this argument, we held:

> Although Bienz' grievance identified her as the claimant, identified the time and nature of her loss, and requested that she be afforded a grievance hearing, Bienz' grievance failed to inform the Board that Bienz intended to assert a tort claim.
>
> In order to constitute substantial compliance, the notice must not only inform the political subdivision of the facts and circumstances of the alleged injury but must also advise of the injured party's intent to assert a

> tort claim. *See Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989). The grievance filed by Bienz failed to inform Bloom and the Board of her intent to assert a tort claim. The grievance did not comply with the provisions of the Act.
>
> Likewise, Bienz' § 1983 federal action did not inform Bloom and the Board of her intent to assert a tort claim in state court. As was stated above, the notice requirement of the Act does not apply to claims based upon civil rights. By commencing a civil rights action against Bloom and the Board, Bienz informed the appellees of her intent to assert a "non" tort claim action. Bienz' civil rights action was nothing more than a notice she intended to bring a § 1983 action against Bloom and the Board. The federal action did not amount to substantial compliance with the Act.

Id.

Here, it is apparent that Redbud's "Notice of Claim," quoted above in the facts section of this opinion, simply does not inform the DNR of its intent to assert a *tort* claim. Rather, the notice addresses a "contract" and money "due and owing" to Redbud on account of its work and materials furnished at the Fort Harrison project, and it seeks to hold the DNR "liable" "to the extent of any amount which may now be due or may hereafter become due from the DNR to or for [ICC], as well as to place DNR on notice of [Redbud's] claim against any bond which may exist and cover this project." Ex. 19. On appeal, Redbud claims that the DNR is negligent per se for violating various statutes. However, there is no mention of any of these statutory violations in Redbud's "Notice of Claim," nor is there any mention of the words "tort," "negligent," or "negligence." Rather, the notice merely addresses a contract and construction dispute. And while the "Notice of Claim" may have put the State on notice of Redbud's intent to assert a non-tort claim against it, the notice simply does not inform the DNR of Redbud's intent to

assert a tort claim against it.[3] As such, Redbud's "Notice of Claim" fails to comply with the Tort Claims Act. Based on this, the trial court properly dismissed Redbud's tort claims against the DNR. We therefore affirm the trial court's grant of the DNR's motion for judgment on the evidence.

Affirmed.

DARDEN, J., and RILEY, J., concur.

[3] In fact, when Redbud later filed its complaint against the DNR, it did not allege a cause of action for negligence either. And when Redbud presented evidence at trial regarding the DNR's violation of various statutes, which it claims constitutes negligence per se, the DNR moved for judgment on the evidence citing Redbud's failure to comply with the Tort Claims Act.